Supreme Court, U.S.
FILED
MAY 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1243

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

A & B HEATING AND AIR CONDITIONING, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

	Page
Cases:	
Burke v. *Barnes*, No. 85-781 (Jan. 14, 1987)	4
Clement, In re, No. 86-4811-BKC-8P1 (Bankr. M.D. Fla. Feb. 1, 1988)	2-3
Gens v. *United States*, 615 F.2d 1335 (Ct. Cl. 1980)	3
Ribs-R-Us, Inc., In re, 828 F.2d 199 (3d Cir. 1987)	2
State Fair v. *United States Consumer Product Safety Commission*, 454 U.S. 1026 (1981)	4
Technical Knockout Graphics, Inc., In re, 833 F.2d 797 (9th Cir. 1987)	2
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)	1, 4
USLIFE Title Ins. Co. v. *Harbison*, 784 F.2d 1238 (5th Cir. 1986)	3
Statutes:	
Internal Revenue Code (26 U.S.C.):	
§ 6511(a)	3
§ 6672	1, 2, 3
Miscellaneous:	
[2 Admin.] Internal Revenue Manual (CCH) (May 1987)	3

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Respondent contends in its brief in opposition that the petition for a writ of certiorari should be denied on grounds of mootness because the outstanding withholding tax liability has been paid by the corporation's responsible person (see 26 U.S.C. 6672). This contention is erroneous in two respects. First, the suggestion of mootness is incorrect. Second, and more important, when and if the case becomes moot, it would not be appropriate for this Court to deny the petition. Rather, the correct course of action would be to grant the petition, vacate the judgment of the court of appeals, and remand with a direction to dismiss the case as moot. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

1. As explained in our petition, we sought certiorari in this case in order to resolve a conflict in the circuits on an important and frequently recurring issue of federal law. The court below upheld the power of a bankruptcy court to allow a corporate debtor's Chapter 11 reorganization

plan to contain a provision designating priority federal tax payments under the plan for application first to trust fund tax liability. That would have the effect of reducing pro tanto the separate liability of respondent's responsible officers for the trust fund taxes (see 26 U.S.C. 6672). As a result, tax payments under the Chapter 11 plan would first redound to the benefit of the corporate officers, not the government, and, if the plan failed after a few payments, the government would be left with uncollectible non-trust-fund tax liabilities. In the absence of such a provision, the government would have a greater opportunity to make itself whole because it could apply the corporate Chapter 11 plan payments first to the corporation's non-trust-fund tax liabilities and then, if the plan failed, seek to recover the trust fund taxes from the responsible corporate officers.

The decision below is the only court of appeals decision to uphold the validity of such a designation provision in a Chapter 11 plan. We sought certiorari to resolve a conflict with the Third and Ninth Circuits, which have held that such a designation is invalid because a taxpayer is not entitled to designate the application of involuntary payments of tax liabilities, such as those made pursuant to court order. See *In re Technical Knockout Graphics, Inc.*, 833 F.2d 797 (9th Cir. 1987); *In re Ribs-R-Us, Inc.*, 828 F.2d 199 (3d Cir. 1987).

2. Subsequent to the filing of the government's petition, steps have been taken to moot the case. On February 1, 1988, Arthur Clement, respondent's responsible officer who is liable under Section 6672 for the corporation's delinquent trust fund taxes and who is represented by the same counsel as respondent, obtained a bankruptcy court order in his personal bankruptcy proceedings that authorized the sale of his personal residence and the payment in full of all liens thereon. *In re Clement*, No.

86-4811-BKC-8P1 (Bankr. M.D. Fla.). One of those liens was a federal tax lien securing his Section 6672 liability. The property has now been sold, and Clement has satisfied his Section 6672 liability, thereby releasing the tax lien.

Respondent suggests that this development moots the case, stating that, in light of the responsible officer's satisfaction of the tax liability, "all payments received by Petitioner pursuant to the Chapter 11 plan can now be applied without regard to the designation set forth in Respondent's plan" (Br. in Opp. 2). It is highly questionable, however, whether the government is entitled to ignore the designation provision in the Chapter 11 plan. A responsible person has two years to seek a refund of a payment he has made (26 U.S.C. 6511(a)). See *USLIFE Title Ins. Co.* v. *Harbison*, 784 F.2d 1238, 1243 n.6 (5th Cir. 1986). Until the final adjudication of such a refund suit or until the time for filing a refund suit expires, it is not certain that the government will be entitled to retain the payment. See *id.* at 1244; *Gens* v. *United States*, 615 F.2d 1335, 1340 (Ct. Cl. 1980). Accordingly, the Internal Revenue Manual provides that an assessment against the corporation for trust fund taxes will not be abated upon the satisfaction of the liability by a corporate officer; rather, the assessment is not abated until the expiration of the statutory period for bringing a refund claim. See [2 Admin.] Internal Revenue Manual (CCH) 5638.1(b), at 6821 (May 1987). Because the trust fund tax assessment against the corporation has not been abated, the government arguably remains bound by the designation provision of the Chapter 11 plan to apply tax payments first to satisfy that assessment. And Clement, the responsible officer, will retain for two years his right to seek a refund of the amount he paid; indeed, application of the Chapter 11

payments to reduce the corporation's trust fund tax liability would provide Clement with a basis for obtaining a refund.

This case therefore is not moot at this time. It is within respondent's power to moot the case, however, by withdrawing the designation provision, with prejudice, from its reorganization plan. It is not apparent why respondent should be unwilling to take this action; its representation in the brief in opposition (at 2) that it does not regard the government as bound to abide by the designation indicates that respondent does not intend to rely upon it. Thus, in light of the steps that Clement, represented by respondent's counsel, has taken toward mooting the case and in light of respondent's suggestion in its brief in opposition that it views the designation provision as a dead letter, there is no assurance that respondent would permit this case to be decided when it has the power to moot the case at any time by withdrawing the designation provision. At the present time, however, there persists a conflict in the circuits warranting this Court's review.

3. In any event, respondent errs in suggesting that a petition for certiorari should be denied if it becomes moot. The "established practice" when a civil case meriting review has become moot while on its way to this Court is to vacate the judgment below and to remand with instructions to dismiss the case as moot. *United States* v. *Munsingwear*, 340 U.S. at 39-40. See also, *e.g.*, *Burke* v. *Barnes*, No. 85-781 (Jan. 14, 1987); *State Fair* v. *United States Consumer Product Safety Commission*, 454 U.S. 1026 (1981). As the Court explained in *Munsingwear*, this practice "eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary" (340 U.S. at 40). Thus, if mootness

prevents this Court from resolving the conflict in the circuits occasioned by the decision below, the Court should vacate the judgment below and remand the case for appropriate action.

At this time, there is considerable uncertainty about when and if this case will become technically moot because of the apparent inconsistency between the retention of the designation provision in respondent's Chapter 11 plan and respondent's suggestion in this Court that it no longer intends to rely on that provision. That uncertainty can be definitively resolved by action taken in the bankruptcy court. Accordingly, the Court may wish to consider vacating the judgment below and remanding the case to the court of appeals with instructions to direct the bankruptcy court to remove the designation provision from the plan in light of respondent's representation to this Court that payments under the plan "can now be applied without regard to the designation" (Br. in Opp. 2).

Respectfully submitted.

CHARLES FRIED
Solicitor General

MAY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60437